[redacted]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool	)	PR Docket No. 89-553
	)	
Implementation of Sections 3(n) and 322 of the Communications Act	)	GN Docket No. 93-252

To: The Commission

APPLICATION FOR REVIEW

CMH, Inc. ("CMH") and CelSMeR, by their attorneys and pursuant to Section 1.115 of the Commission's Rules, request Commission review of the Second Erratum, DA 95-2327, released November 8, 1995 by the Wireless Telecommunications Bureau ("WTB"). The Second Erratum substantively changed Section 90.665(c) of the Rules by eliminating all construction benchmarks for 900 MHz MTA auction licensees. The new rule adopted in the Second Erratum reversed the final rule adopted in the Commission's Second Order on Reconsideration and Seventh Report and Order, FCC 95-395, released September 14, 1995, 60 Fed. Reg. 48,913 (September 21, 1995) ("Second Recon Order") without initiating a new rulemaking proceeding as required by statute, and without any rational basis in the record.

I. Background

In the Second Recon Order, the Commission adopted Section 90.665(c) as a final rule that read as follows:

> (c) Each MTA licensee in the 896-901/935-940 MHz band must, three years from the date of license grant, construct and place into operation a sufficient number of base stations to provide coverage to at least one-third of the population of the MTA. Further, each MTA licensee must provide coverage to at least two-thirds of the population of the MTA five years from the date of license grant or, alternatively, demonstrate through a showing to the Commission that it is providing substantial service.

(Emphasis added). *See* Second Recon Order, Appendix A, p.81. The stated purpose of the rule was to "require 900 MHz MTA licensees to provide coverage to one-third of the population of their service area within three years of initial license grant and to two-thirds of their service area within five years." Second Recon Order at ¶ 31. Licensees that could not provide coverage to two-thirds of the population of the service area after five years could alternatively demonstrate that they were providing "substantial service" to the service area. The substantial service mechanism was implemented "for specialized users who may not be able to meet the two-thirds requirement due to individualized circumstances." Id.

After analyzing petitions for reconsideration, the Commission's Third Order on Reconsideration, FCC 95-429, released October 20, 1995, 60 Fed. Reg. 55,484 (November 1, 1995) ("Third Recon Order") did not alter the language of Section 90.665(c) of the Rules and reaffirmed that:

> 900 MHz MTA licensees must provide coverage to one-third of the population of their service area within three years of initial license grant . . . or, at the five year mark, submit a showing of substantial service.

Third Recon Order at ¶ 2.

The Commission's clear directive in the Second Recon Order, as reiterated in the Third Recon Order, was that all 900 MHz MTA

licensees were expected to meet their three-year/one-third construction benchmark. Five years from their license grant date, licensees would have the option of demonstrating either coverage to two-thirds of the population of its service area or "substantial service" to the service area, but the three-year/one-third requirement was a hard and fast rule.

The coverage requirements were designed to advance two important Commission policy goals: prevent anti-competitive spectrum warehousing, compel rapid deployment of new 900 MHz service and develop ubiquitous regional 900 MHz systems.

The Second Erratum dramatically changed Section 90.665(c) to read as follows:

> Each MTA licensee in the 896-901/935-940 MHz band must, three years from the date of license grant, construct and place into operation a sufficient number of base stations to provide coverage to at least one-third of the population of the MTA; further, each MTA licensee must provide coverage to at least two-thirds of the population of the MTA five years from the date of the license grant. The MTA licensee must meet the population coverage benchmarks regardless of the extent to which incumbent licensees are present within the MTA block. Alternatively, an MTA licensee must demonstrate, through a showing to the Commission five years from the date of license grant that it is providing substantial service.

The above-quoted change is sweeping, changing so much punctuation and text that it could not possibly have been left out of both the Second Recon Order and the Third Recon Order by "typographical" or "clerical" error. Under the Second Erratum, MTA auction licensees no longer have to demonstrate service to one-third of their coverage area after three years! The new Section 90.665(c) allows MTA licensees, three years after their license

issue date, simply to provide written notification of their intent to demonstrate substantial service to the coverage area at the end of five years. Second Erratum at ¶ 1. In other words, MTA auction licensees now can warehouse the spectrum to keep it from competing with other companies if they are willing to pay off the FCC. This result is contrary to the clear, plain language of the final rule adopted in the Second Recon Order, and was adopted without a new rulemaking in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 et seq.

II. The Second Erratum Cannot Be Implemented without a New Rulemaking Procedure

The Commission had consistently and clearly stated its intent to require all 900 MHz MTA auction licensees to provide coverage to one-third of the population of its service area within three years when the rulemaking was pending.[1] The overwhelming majority of comments from interested parties supported that policy, and supported the specific three-year/one-third construction benchmark as an appropriate requirement to place upon 900 MHz MTA auction licensees. Now, in an erratum, the Commission surreptitiously attempts to circumvent the APA by substantively amending that final rule without a new rulemaking proceeding.

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[1] *See* Second R&O and Second NPRM at ¶ 40 ("We will require 900 MHz MTA licensees to provide coverage to one-third of the population of their service area within three years of initial license grant"); Second Recon Order at ¶ 31 ("We will retain the coverage requirements outlined in Section 90.665(c), which require 900 MHz MTA licensees to provide coverage to one-third of the population of their service area within three years of initial license grant); Third Recon Order at ¶ 2.

The Commission's one paragraph Second Erratum is far more than a technical correction, it is a drastic change in policy, promulgated *sua sponte* by the Commission when no petition for reconsideration or petition for judicial review had been filed. The Commission lacked the statutory authority under either the APA or the Communications Act of 1934 as amended ("Act"), 47 U.S.C. §§151 *et seq.*, to adopt the new rule promulgated in the Second Erratum. Section 553 of the APA, 5 U.S.C. § 553, specifically prohibits agencies from adopting new rules or policies without providing the public with notice and an opportunity to comment by way of a rulemaking proceeding. That statutory requirement is viewed as a fundamental principle of administrative law:

> Finally, and most important of all, highhanded agency rulemaking is more than just offensive to our basic notions of democratic government; a failure to seek at least the acquiescence of the governed eliminates a vital ingredient for effective administrative action. Charting changes in policy direction with the aid of those who will be affected by the shift in course helps to dispel suspicions of agency predisposition, unfairness, arrogance, improper influence, and ulterior motivation.[2]

The Commission's Second Erratum not only ignored the requirements of the APA, but also provided no reasoned explanation for its departure from the rule it established in the Second Recon Order. Agencies are under a heavy burden to provide reasoned explanations for departures from existing rules and policies:

> An agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed and not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.

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[2] Chamber of Commerce v. Occupational Safety and Health Administration, 636 F.2d 464, 470-71 (D.C. Cir. 1980).

Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971). When an agency fails to explain its departure from established rule or policy, its action is arbitrary, capricious and an abuse of discretion. *See* Public Citizens, Inc. v. FAA, 988 F.2d 186, 197 (D.C.Cir.1993).

III. The New Rule Proposed in the Second Erratum Is Arbitrary and Capricious

The Commission's decision to allow 900 MHz MTA licensees to acquire spectrum through auction, but not to require those licensees to meet any mandatory construction benchmark ever is arbitrary and capricious.[3] Congress gave the Commission spectrum auction authority and directed the Commission to adopt rules that would

> ...include performance requirements...to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services.

See Omnibus Reconciliation Act of 1993, Pub.L.No. 103-66, § 6002(a), 107 Stat. 312 (1993), 47 U.S.C. § 309(j)(4)(B). In establishing rules for broadband PCS, the Commission adopted five-year/one-third and ten-year/two-third construction benchmarks.[4] Given that each 900 MHz license is only 250 kHz of spectrum, the 900 MHz MTA licensee benchmark of service to one-third of the

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[3] The question of whether the Commission acted arbitrarily and capriciously in adopting rules without notice and comment, see Part II above, is separate from the question of whether the rules that the Commission adopted were themselves arbitrary and capricious. See Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc., 467 U.S. 837, 842-45 (1984).

[4] PCS Memorandum Opinion and Order, 9 FCC Rcd 4957, 5018 (1994).

coverage area after three years was the bare minimum to meet what Congress intended.

The Second Erratum completely eliminates all mandatory construction benchmarks for 900 MHz MTA licensees. Licensees could warehouse large amounts of spectrum for five years by pledging to demonstrate "substantial service" to a small niche market five years after license grant. Even then, if they have made their auction payments and done minimal construction, the Commission would be hardput to rescind a license based upon the amorphous "substantial service" criterion. It was only the express decision to require a baseline three-year/one-third construction standard that rendered the vague "substantial service" standard at five years rational.

The lack of any concrete construction standards for 900 MHz MTA licensees is at odds with Congress' directive, and will inhibit the rapid deployment of this new service to the public. Section 90.665(c) as set forth in the Second Erratum is directly contrary to all of the Commission's prior published decisions on the issue and was adopted without explanation for the departure. Thus, the new rule is on its face, arbitrary and capricious and should be rescinded.

V. Conclusion.

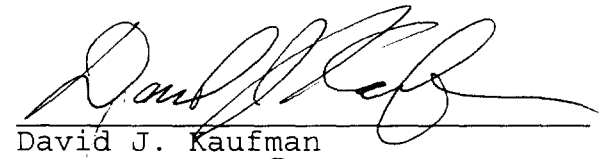
Section 90.665(c) was clear and unambiguous as adopted in the Second Recon Order. The new rule set forth in the Second Erratum was adopted without a new rulemaking proceeding, in violation of the APA. Also, the Commission's action was arbitrary and capricious because it failed to provide an explanation for departure from existing rules. Even assuming the Commission's

Second Erratum was lawfully adopted, the rule itself undermines the Congressional policy against spectrum warehousing, inhibits the rapid deployment of 900 MHz service to the public, and discourages development of regional ubiquitous 900 MHz service.

WHEREFORE, CMH and CelSMeR respectfully request that the Commission rescind the new rule adopted in the Second Erratum.

Respectfully submitted,

CMH, Inc. and CelSMeR

By: 
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CERTIFICATE OF SERVICE

I, Melissa L. Clement, a secretary at the law firm of Brown Nietert & Kaufman, Chartered, do hereby certify that I caused a copy of the foregoing "**Application For Review**" to be sent via first class U.S. mail, postage prepaid or to be hand delivered, this 8th day of December, 1995 to each of the following:

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